LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
APR 1 1960
JOHN T. FEY, Clerk

No. 886

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,226

FARBENFABRIKEN BAYER A. G., *Appellant*

v.

STERLING DRUG, INC., *Appellee*

On Appeal from a Judgment of the United States District Court for the District of New Jersey

APPENDIX FOR APPELLANT FARBENFABRIKEN BAYER A. G.

THURMAN ARNOLD
MILTON V. FREEMAN
Arnold, Fortas & Porter
1229 - 19th Street, N.W.
Washington 6, D. C.

ALEXANDER T. SCHENCK
Bailey and Schenck
1180 Raymond Boulevard
Newark 2, New Jersey

TABLE OF CONTENTS

	Page
Docket Entries	1a
Complaint	3a
Excerpts from Answer	14a
Order to Show Cause	17a
Opinion of Judge Smith entered February 5, 1957	18a
Order of Judge Smith entered March 4, 1957	24a

APPENDIX

Docket Entries

Civil 909-55

Date	Filings—Proceedings
9-28-55	Complaint, filed.
9-28-55	Summons issued.
9-28-55	Notice of Allocation and assignment, filed (Newark-Smith).
10-5-55	Summons returned served on 9-30-55, filed 10-4-55.
11-1-55	Plaintiff's motion to vacate defendant's notice of depositions and to establish procedure for taking depositions, filed.
11-4-55	Stipulation and order extending time to answer to 11-21-55, filed 11-3-55 (Smith) Notice mailed.
11-7-55	Notice of motion by plaintiff to vacate defendant's notice of depositions and to establish procedure for taking depositions, and acknowledgement of service, filed (ret. 11-14-55) (No brief submitted).
11-14-55	Order to Show Cause re transfer of action to Southern District of New York or in the alternative to dismiss complaint ret. 12-12-55; staying further proceedings pending determination of motion, filed 11-14-55 (Smith) Notice mailed. (See C. 908-55).
11-17-55	Affidavit of service of copy of order to show cause, filed 11-16-55 (See C. 908-55).
12-7-55	Affidavit of Thurman Arnold in opposition to defendant's motions to transfer or dismiss, filed 12-6-55.
12-9-55	Affidavit of John T. Cahill, filed 12-8-55 (See 908-55).

12-13-55—Ordered plaintiff's motions to vacate defendant's notice of depositions and to establish procedure for taking depositions held in abeyance. (Smith) (12-12-55).

12-13-55—Hearing on order to show cause re transfer of action to Southern District of New York or in the alternative to dismiss complaint. Decision Reserved. (Smith) (12-12-55).

12-13-55—Reply affidavit of John T. Cahill, filed 12-12-55 (See C. 908-55).

3-16-56—Order denying application to transfer action to Southern District of New York, filed 3-15-56 (Smith) Notice mailed (See C. 908-56).

3-19-56—Answer, filed 3-16-56.

3-23-56—Affidavit of service of copy of answer filed.

3-27-56—Order to show cause re entry of summary judgment for defendant; and staying proceedings, filed 3-26-56 (Smith) Notice mailed. (ret. 5-14-56) (See C. 908-55).

3-29-56—Affidavit of service of order to show cause, filed. (See Civ. 908-55).

5-9-56—Substitution of Attorneys, filed 5-8-56.

6-12-56—Hearing on application re: entry of summary judgment, for defendant. Decision Reserved. (Smith) (6-11-56).

6-13-56—Order suspending Rule 19 for completion of discovery until further order of Court, filed 6-11-56 (Smith) Notice mailed.

9-19-56—Transcript of hearings held on Dec. 12, 1955, filed 9-18-56 (See C. 908-55).

9-19-56—Transcript of hearing held on June 11, 1956, filed 9-18-56 (See C. 908-55).

2-6-57—Opinion filed 2-5-57. (Smith) (Motion for summary judgment denied) (dismissing action without prejudice).

Complaint

3-5-57—Order denying motion for Summary Judgment and dismissing action with costs in favor of the defendant, Sterling Drug, Inc. and against the plaintiff, Farbenfabriken Bayer, A. G., a corporation, filed 3-4-57. (Smith) Notice mailed.

3-5-57—Statement of Defendant's costs taxed at $20.00, filed.

3-7-57—Notice of Appeal filed 3-5-57.

3-7-57—Copies forwarded to Clerk, USAC and to Atty. for Deft.

3-7-57—Bond on Appeal filed.

Complaint for Accounting and Other Relief Arising Out of Contract

1. Plaintiff Farbenfabriken Bayer A.G. is a corporation organized under the laws of Germany, with its principal offices and factory at Leverkusen, Germany. The plaintiff is engaged among other things in the manufacture and distribution of drugs and pharmaceuticals of all kinds and the export of such drugs and pharmaceuticals.

2. Defendant Sterling Drug, Inc. is a corporation organized under the laws of the State of Delaware. It is engaged in the manufacture, sale and distribution of drugs and pharmaceuticals directly and through subsidiaries in the United States and in various other parts of the world.

3. The defendant maintains offices and manufacturing facilities and transacts business within the District of New Jersey.

4. Jurisdiction of this Court is invoked under 28 U.S.C. §1332(a)(2). The matter in controversy exceeds the required amount exclusive of interest and costs.

5. Farbenfabriken Bayer A.G. is the legal successor to Farbenfabriken vorm. Friedrich Bayer & Co. of Leverkusen, Germany with respect to all relevant matters re-

ferred to herein. The term "Bayer" used herein means the plaintiff or its predecessor in existence at the particular time.

6. The defendant is the legal successor to a number of predecessor companies including The Bayer Co., Inc. of New York. "Sterling" hereinafter means the present company or its predecessor in existence at the particular time.

For a First Cause of Action

7. The plaintiff corporation is the successor of the firm of Friedrich Bayer & Co. founded at Elberfeld, Germany, in 1863, the name of which was changed in 1881 to Farbenfabriken vorm. Friedrich Bayer & Co. About 1900 the principal manufacturing activities were transferred to a new plant at Leverkusen, Germany and in 1912 the main offices of the company were also transferred to Leverkusen. Plaintiff and its predecessors have for many years engaged in the manufacture of pharmaceutical preparations. Its research developed the revolutionary drug Aspirin, for many years and still the world's most widely used single drug, and many other great discoveries including the sulfa drugs. Its products were sold throughout the world under the name Bayer and by the use of various trademarks, the most famous of which is the so-called Bayer Cross which consists of the name Bayer spelled in cross fashion horizontally and vertically in a circular background.

8. Beginning in 1895 Bayer formed a subsidiary company in the United States under the name of Farbenfabriken of Elberfeld Company, later reincorporated as the Bayer Co., Inc. of New York. This company had manufacturing facilities at Rensselaer, New York, and conducted its business under the name of Bayer and with the use of trade names and trademarks associated in the public mind with the parent company. Its most widely used and advertised product was Bayer Aspirin. This was identified by the name

Bayer, the Bayer Cross and the name Aspirin (until sometime after the First World War, "Aspirin" was a valid trademark in the United States). The word "Aspirin" or "Aspirin products" as used hereinafter mean not only acetylsalicylic acid but also various compounds thereof.

9. In Latin America the parent Bayer Company through various subsidiaries sold Bayer Aspirin and Aspirin compounds inter alia, under the name, Bayer and under the Bayer Cross.

10. During the First World War the United States Alien Property Custodian seized all the assets of the plaintiff in the United States and sold them to Sterling Products (Incorporated), a predecessor corporation of the defendant.

11. By this purchase from the Alien Property Custodian, Sterling obtained control in the United States of the trademark Bayer, of the Bayer Cross, and of the name Aspirin as well as a number of other valuable trademarks and trade names.

12. The New York Corporation seized by the Alien Property Custodian had no trademark rights in Latin America to the name Bayer, the Bayer Cross or the various Aspirin trade names. However, it was discovered that in a number of Latin American countries, important trademarks of Bayer were about to lapse and required renewal. It was also discovered that in some countries Bayer had sold its products under these names but had not registered the marks. Sterling knew that Bayer was in a weak and defenseless position as a result of the defeat of Germany in World War I, and that the currency of Germany was weak and rapidly becoming weaker. Taking advantage of this weakness, Sterling aggressively intervened in various Latin American countries to take over for itself the rights belonging to Bayer. Sterling entered every possible area. By this means Sterling succeeded in obtaining for itself the registration of the name Bayer, the Bayer Cross and vari-

ous Aspirin trademarks among others in such countries as Mexico, Paraguay, Bolivia, Nicaragua, Honduras, Panama, etc.

13. By these means, Sterling put Bayer under a serious competitive disadvantage with respect to the Latin American market. To obtain the return of its trademarks in Latin America would have required lengthy and expensive litigation in various countries. The burden was one which the economic situation of Bayer and Germany in general rendered most difficult if not impossible. To get back its trademarks Bayer had to come to terms with Sterling. The general manager of Sterling came to Europe and pressed Bayer to negotiate the matters. Bayer had no choice but to accept Sterling's invitation and a series of conferences were held in Europe commencing in the summer and fall of 1919. Sterling limited the discussions to the Latin American trade and to the trade in Aspirin and its compounds there. Under these circumstances Bayer in 1920 reluctantly agreed to enter into a joint enterprise with Sterling for a period of 50 years in the sale of Aspirin products in Latin America. This agreement provided in substance that Bayer for the return of its trademarks would give up 25% of the profits of the Latin American business for 50 years. Thus Sterling, by aggressive registration in various countries of Bayer's trademarks and trade names and by taking advantage of the weak post-war position of Bayer, obtained for itself a 25% participation for 50 years in a business which had been exclusively the property of Leverkusen.

14. This agreement was concluded in Germany in October 1920 and signed by both parties subject to ratification by the American company's home office. It was duly ratified in November 1920. Under the agreement Aspirin products in Latin America were to be sold under the Bayer name and the Bayer trademarks but the business was to be conducted by Sterling, using as distributors, where

possible, the Bayer subsidiaries in Latin America: 75% of the profits were to go to Bayer and 25% to Sterling. A copy of the agreement hereinafter referred to as the "Latin American Aspirin Agreement" or the "1920 Agreement" is attached as Exhibit A to this complaint.

15. The 1920 agreement was limited exclusively to the Latin American business. It concerned only Aspirin and Aspirin compounds, except that in 1935 a general tonic called Tonico Bayer was included in the agreement. The agreement did not cover any other pharmaceuticals. Sterling handled its other pharmaceuticals in Latin America independently of Bayer and under its own trade names through subsidiaries in the various countries. Bayer handled its other pharmaceuticals through its own subsidiaries using the name Bayer and the Bayer Cross.

16. The agreement was carried out by both parties for approximately 20 years. The joint venture, building on the enterprise previously conducted by Bayer alone, developed a large and profitable business in Latin America. It had channels of distribution, a large public acceptance, and favorable relations with its customers, all constituting a valuable goodwill, as well as the Bayer trademarks. Bayer, having cheaper manufacturing costs, delivered products covered by the contract during all the years from 1920 to 1939. At that time, delivery from Europe became difficult because of the war. Accordingly, as provided in the contract in such case, Sterling then assumed deliveries from its facilities in the United States.

17. The Latin American distribution agencies were, in general, subsidiaries of Bayer. In 1941, Sterling insisted that because of the international situation, distribution should be transferred to subsidiaries of Sterling in each of the Latin American countries. This was in fact done in the spring and summer of 1941, and the entire joint business in Latin America was thus entrusted by Bayer to Sterling and its subsidiaries.

18. Payments had been made to Bayer under the contract at least through the year 1939. Although Sterling continued to perform under the contract through the summer of 1941, it has made no accounting, or payment of the profits of the joint enterprise for the year 1941 and on information and belief some payments on account of 1940 were not made.

19. The Bayer share of the profits for the year 1941 is believed to be at least $500,000 although the exact amount is not known. The amount which has not been paid for the year 1940 is not known.

20. The sums in question were never vested by the Alien Property Custodian.

Wherefore, plaintiff prays for an accounting of the profits of the joint Latin American business under the 1920 contract for the years 1940 and 1941 and payment to it of the amounts so allowed, and for such other and further relief as to the Court seems just.

For a Second Cause of Action

21. Plaintiff repeats the allegations of paragraphs 1 to 20.

22. In August 1941, Sterling requested a termination of the joint Latin American business enterprise "while conditions still permit our doing so on a negotiated basis". It declared its desire to dissolve all contracts, agreements, understandings and partnerships and to divide jointly held property and to terminate all obligations and rights resulting from the Latin American agreement. Despite threats from Sterling that force majeure might destroy the Latin American business, Bayer refused, and insisted that the agreements could not be terminated.

23. On information and belief Sterling had at this time already formulated a plan to appropriate to itself the

Latin American Aspirin market and to exclude Bayer. To this end it used the fact that the entire business had been entrusted to it by the transactions in the spring and summer of 1941 as described in 17 above.

24. It thus had complete control of the Latin American business which had been created and developed by Bayer and thereafter had been further carried forward by 20 years of joint effort. Sterling used the good will of the joint enterprise, its distribution methods, its customers lists and all its other valuable assets exclusively for its own benefit. This it did in the following manner: It introduced into the Latin American market a substitute Aspirin preparation under the name Mejoral. The name "Mejoral" approximates the Spanish word for "better" and it was intended to and did create the impression that it was a better product developed by the joint enterprise. This substitute Aspirin preparation was substantially identical to the products sold by the joint enterprise and Sterling so informed the customers who had purchased products from the joint enterprise. The substitute product was packaged in a special manner distinctive of the products of the joint enterprise, i.e., two tablets in a glassine envelope. Mejoral was sold at the same price and through the same channels of distribution as the products of the joint enterprise. By this means Sterling appropriated 100% of the business of the joint enterprise.

25. Furthermore, plaintiff is informed and believes that Sterling paid the expenses of the transfer of the good will of the joint enterprise to its own possession by Bayer's funds. Plaintiff is further informed and believes that Sterling applied to this purpose the sums previously stated to be at least $500,000 due to Bayer under the 1920 Latin American Aspirin agreement for the year 1941. Instead of paying these funds to Bayer as it was obligated, Sterling withheld the payment and used it to pay the expenses necessary to advise the Latin American wholesalers and

public that the product they had previously known under the name of Bayer Aspirin or similar related names would now be available under the new name Mejoral. Thus the appropriation by Sterling of the Latin American Aspirin business to itself was not only an appropriation of the entire good will of the joint business but it was actually carried out with the plaintiff's funds.

26. In addition, Sterling set about a program of safeguarding the business it had appropriated. It intended not only to keep from Bayer the business it had appropriated, but also to prevent Bayer from ever returning to compete with that business after the war. For this purpose it caused cancellation of the registration of Bayer Aspirin products by the health authorities in the various countries so the products could no longer be sold in those countries. Further, it obtained control by various means of a number of the trademarks for Aspirin and Aspirin compounds owned by Bayer in several Latin American countries, including the name Bayer and the Bayer Cross. It acquired these trademarks, not for the purpose of using them, but solely for the purpose of freezing Bayer so far as possible out of the Latin American markets in the postwar period when it would again be possible for Bayer to return to those markets. This activity was a further violation of Sterling's fiduciary obligations arising from the 1920 agreement of joint venture.

27. The claims of Bayer resulting from these events relating to the Latin American Aspirin business and the appropriation of the assets and good will of that business were not vested by the United States Alien Property Custodian.

28. By the end of 1946 trade relations were restored between the United States, Germany and Latin America. Resumption of business relations and accounting between the partners under the 1920 contract then became legally

possible. Nevertheless, Sterling did not grant Bayer any participation in the business which it had erected by the use of the funds and the good will of the joint Bayer-Sterling business, nor did it account to Bayer in any way. Instead Sterling denied any obligation to account to Bayer with respect to the Latin American joint venture, and refused even to discuss the matter.

29. By appropriating the funds and good will of the existing Latin American Aspirin business during the period prior to and during the war and by its other activities recited above, Sterling is the trustee of the business it now conducts in Aspirin products and compounds (e.g., Mejoral) in Latin America, and in other products covered by the agreement of 1920. It is accordingly required to account to Bayer with respect to that business for all years from 1947 forward.

30. The exact extent of the relief to which Bayer is entitled because of the joint enterprise and properties appropriated is not known to plaintiff and for that reason discovery is necessary.

WHEREFORE, plaintiff prays (1) for a declaration that the business now conducted by Sterling in Aspirin products (e.g., Mejoral) in Latin America and in other products covered by the 1920 agreement is held by it in proper part as trustee for plaintiff, and (2) for an accounting with respect to said business, and (3) for such other and further relief as may to the Court seem just.

For an Alternative Third Cause of Action

31. Plaintiff repeats the allegations of paragraphs 1-29.

32. By reason of the activities recited above Sterling is guilty of a breach of the 1920 agreement by its actions in 1941 and thereafter.

33. For this breach, in lieu of impressing a trust on Sterling's Latin American business, if for any reason such a trust should not be impressed, plaintiff pleads in the alternative that it has been damaged by the breach of the contract.

34. As a result of this breach by defendant plaintiff lost its interest in a valuable going business which defendant appropriated to itself and its share of the profits of that business.

WHEREFORE, plaintiff prays in the alternative for damages for breach of the Latin American Aspirin agreement of 1920.

For a Fourth Cause of Action

35. Plaintiff repeats the allegations of paragraphs 1-30 hereof.

36. In the years 1937 and 1938 Sterling and Bayer entered into agreements to purchase from independent third parties control of a company engaged in the sale of Aspirin products in Chile and of another company engaged in the sale of Aspirin products in Argentina.

37. Pursuant to this understanding Sterling in those years purchased the business of these companies as agent and trustee for Bayer as to 75%. The Chilean company, Laboratorios Recalcine, was purchased and its assets placed in a new company formed for this purpose and called Laboratorios Hegemann y Cia. Ltda. of Santiago, Chile. In the case of the Argentine company called Laboratorios Suarry S.A. of Buenos Aires, a majority of the shares were purchased and the same company continued.

38. It was agreed between Bayer and Sterling that the purchase of each of these companies was to be 75% for the benefit of Bayer and 25% for the account of Sterling, and that payment was to be made in the same proportion.

The purchase price was in each case advanced in full by Sterling. It was agreed, however, that Bayer's 75% share plus interest thereon at 4% was to be liquidated (a) out of the share of Bayer in the profits of the particular company, and (b) out of Bayer's share in the profits of the particular country (Chile or Argentina) under the Latin American Aspirin agreement of 1920.

39. By this means full payment was made by Bayer for its 75% share in the Chilean company by August of 1940. As to the Argentine enterprise, approximately 40% of the purchase price was paid by the end of the year 1940. On information and belief, Bayer's share of the profits of Laboratorios Suarry for the year 1941 and its share of the Latin American 1920 Aspirin contract for Argentina for 1941 was substantial. However, defendant has made no accounting of the amount of profits for the period in question and for periods thereafter and plaintiff cannot therefore state the extent to which the shares of the Argentine company was paid for in the agreed manner.

40. Although Sterling agreed it would keep in trust for Bayer a 75% interest in these companies, it has to date made no accounting of its trust, and plaintiff is informed and believes that Sterling has appropriated to its own use the properties and businesses in question.

41. Certain other properties and companies in Latin America were jointly owned by Bayer and Sterling and entrusted to Sterling. Sterling has to date made no accounting to Bayer in this respect and Bayer is informed and believes Sterling has appropriated to its own use the properties and businesses in question.

42. Sterling is liable to account to Bayer for these companies and the proceeds of their businesses. Bayer is not specifically informed as to the disposition of these businesses and demands discovery and an accounting therefor.

WHEREFORE, plaintiff demands (1) an accounting from Sterling with respect to the so-called Hegemann and Suarry businesses purchased for joint account in 1937 and 1938, and all other joint businesses and properties in Latin America, and (2) the impressing of such trusts and the payment of such amounts as may restore it to the status to which it is equitably entitled with respect to such business and properties, and (3) for such other further relief as may to the Court seem just.

ALEXANDER T. SCHENCK
Bailey, Schenck & Bennett
744 Broad Street
Newark 2, New Jersey

THURMAN ARNOLD
MILTON V. FREEMAN
Arnold, Fortas & Porter
1229 - 19th Street, N.W.
Washington 6, D. C.

Attorneys for Plaintiff

September 28, 1955

Excerpts from Answer

* * * * * * * * * *

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

25. Plaintiff and plaintiff's alleged predecessor and assignor, I. G. Farbenindustrie, at all times during their respective corporate existence in and after 1941 were corporations organized under the laws of Germany and were subjects and residents of Germany.

26. A state of war existed between the United States and Germany from and after December 1941.

27. Under the alleged agreements referred to in the complaint between plaintiff's alleged predecessor and assignor and Sterling or its subsidiaries or affiliates, there were executory provisions to be performed by plaintiff's alleged predecessor and assignor which had not been fully performed at the commencement of said state of war. Such executory provisions constituted a material part of the bargain to defendant represented by said agreements.

28. Plaintiff's alleged predecessor and assignor on and after the declaration of said state of war on or about December 11, 1941 was an enemy of the United States within the purview and meaning of the Act of Congress of October 6, 1917, c. 106, 40 Stat. 411, 50 U.S.C. App. §1, as amended, commonly known and herein referred to as the "Trading with the Enemy Act." By reason of said declaration of war, plaintiff's alleged predecessor and assignor became and continued to be an enemy of the United States, and further performance of said agreements by defendant became unlawful, no sums accrued or became payable from defendant to plaintiff under said agreements, said agreements were abrogated, became null and void, and of no further force and effect.

* * * * * * * * * * *

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

31. Repeats each and every allegation, as if set forth at length herein, contained in paragraphs "25" through "28" of this answer.

32. The Joint Resolution of the Congress of the United States adopted on or about October 19, 1951 (c. 519, 65 Stat. 451) relating to the termination of the state of war between the United States and Germany provided:

> "That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended * * * or which has heretofore been vested or seized under that Act * * * including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act * * * in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior thereto, under that Act of Germany or of any person with respect to any such property or interest."

33. The claims alleged in the complaint (if they exist) were property or interests which prior to January 1, 1947, were subject to vesting or seizure under the provisions of the Trading with the Enemy Act, and the status of plaintiff as an enemy alien with respect thereto has not been changed.

34. Plaintiff cannot lawfully institute or maintain in the courts of the United States any action with respect to the claims alleged in the complaint and this Court is without jurisdiction of the subject matter of this action.

* * * * * * * * * *

EDWARD J. O'MARA
O'Mara, Schumann, Davis & Lynch
No. 1 Exchange Place
Jersey City 2, New Jersey

JOHN T. CAHILL
Cahill, Gordon, Reindel & Ohl
63 Wall Street
New York 5, New York

GEORGE HILLS
Rogers, Hoge & Hills
41 East 42nd Street
New York 17, New York

Attorneys for Defendant

March 16, 1956.

Order to Show Cause

UPON the annexed affidavit of John T. Cahill, sworn to the 23d day of March, 1956, and upon all the pleadings and prior proceedings had herein, and good cause appearing therefor,

NOW, on motion of O'Mara, Schumann, Davis & Lynch, attorneys for Sterling Drug, Inc., the above-named defendant, it is,

ORDERED, that plaintiff above-named show cause before him in the United States District Court, Newark, New Jersey, on the 14th day of May, 1956 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered pursuant to

Opinion

Rules 12(c) and 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of defendant and against plaintiff upon the ground that there was no genuine issue of any material fact and that defendant is entitled to a judgment as a matter of law, and it is

FURTHER ORDERED, that further proceedings of this action be and the same hereby are stayed pending the hearing and determination of the motion upon the return of this Order to Show Cause.

Sufficient reason appearing therefor, service of a copy of this Order, together with the papers upon which it is granted, on or before March 31st, 1956, at 4:00 P.M. o'clock in the afternoon shall be deemed good and sufficient service.

Dated: Newark, New Jersey
March 26, 1956

WILLIAM F. SMITH
United States District Judge

Opinion

Filed February 5, 1957

SMITH, District Judge:

The plaintiff in this action, a corporation organized under the laws of Germany, was formerly an enemy alien within the meaning of Section 2(a) of the Trading with the Enemy Act of 1917, 50 U.S.C.A., App. 2(a). The complaint is in four counts, each of which states a separate and distinct claim: first, a claim for profits allegedly due under a contract; second, a claim to property held by the defendant; third, and in the alternative, a claim for damages for breach of contract; and fourth, a claim based upon a breach of trust. The respective claims, according to the allegations

of the complaint, are predicated on an alleged breach of contract which occurred in 1941, or shortly thereafter, and prior to January 1, 1947. The exact date of the alleged breach of contract is unimportant. The claims, although not seized, were subject to seizure and vesting under the Act.

The defendant filed an answer in which it is alleged, as an affirmative defense, that the plaintiff has no right to "institute or maintain" the action. The defense rests solely upon an express limitation in House Joint Resolution No. 289, 65 Stat. 451, approved October 19, 1951, 50 U.S.C.A., App. XX. The defense is raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

The Joint Resolution, supra, is determinative of the issue raised by the defendant. The Resolution reads as follows:

> "* * *, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, ANY PROPERTY OR INTEREST WHICH PRIOR TO JANUARY 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE UNDER THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917 (40 STAT. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, SHALL CONTINUE TO BE SUBJECT TO THE PROVISIONS OF THAT ACT IN THE SAME MANNER AND TO THE SAME EXTENT AS IF THIS RESOLUTION HAD NOT BEEN ADOPTED and such proclamation had not been issued. Nothing herein and nothing in

such proclamation shall alter the status, as it existed immediately prior thereto, under that Act, of Germany or of any person with respect to any such property or interest." (Emphasis by the Court).

The Joint Resolution by its express terms reserved the right of the United States to seize property which was "subject to vesting or seizure under the provisions of the Trading with the Enemy Act" prior to January 1, 1947.

The force and effect of the Joint Resolution is fully discussed in the excellent opinion by Judge Swaim in the case of *Ladue & Co.* v. *Brownell*, 220 Fed. 2d 468, cert. den., 350 U.S. 823. It is therein stated, at page 471: "* * * the Joint Resolution which officially terminated the war with Germany expressly reserved and extended the power of the United States to seize for its own use all property located in the United States which prior to January 1, 1947, WAS SUBJECT TO VESTING OR SEIZURE under the Trading with the Enemy Act, and which was owned by nationals of Germany. The reservation of this power was an integral part of formally bringing the war to a close. Cessation of hostilities between the United States and Germany had occurred with the unconditional surrender of Germany on May 8, 1945. From that date to October 19, 1951, when the Joint Resolution was approved, only a technical state of war had existed between the United States and Germany. During that period of more than six years the Government had continued to seize property in this country belonging to German nationals." (Emphasis by the Court).

It is further stated at page 471: "In the reservation of the power to seize the property of German nationals Congress may have had in mind that such seizures would tend to serve as a deterrent to a third war with Germany, but it is certain from the Legislative History of the Joint Resolution, * * *, that the proceeds of the property seized were

to be used to remedy the evils which had arisen from the war; that the proceeds of the seized property were to be used to pay the just and legitimate claims against the United States arising from the war in accordance with the War Claims Act of 1948. Seizure of the property of enemy aliens for this purpose was clearly a proper exercise of the war powers."

There can be no doubt that as to property which "was subject to vesting or seizure" prior to January 1, 1947, the right of the United States was preserved and the enemy status of a German corporation was continued, notwithstanding the termination of the state of war. The disqualification incident to the enemy status of a German corporation was likewise continued. It is well established that a nonresident enemy alien, until the disqualification is lifted by a treaty of peace or otherwise, may not invoke the jurisdiction of the Court. *Johnson* v. *Eisentrager*, 339 U.S. 763, 776; *Ex parte Colonna*, 314 U.S. 510, 511; Sec. 7(b) of the Trading with the Enemy Act, 50 U.S.C.A. App. 7(b). This principle applies to a corporation organized under the laws of an enemy state.

We are of the opinion that a German corporation may not prosecute an action to enforce a right of property which is subject to seizure by the Alien Property Custodian under the provisions of the Trading with the Enemy Act, at least until the right of seizure is definitely terminated by law. It follows that the plaintiff may not maintain the instant suit at this time.

The defendant argues that the proviso contained in the Joint Resolution was abrogated by "the events" which followed the approval of the said Resolution. We have carefully examined the documents upon which the plaintiff relies and we are of the opinion that the argument is without merit. We find nothing in these documents inconsistent with the proviso contained in the Joint Resolution. We therefore make only brief reference to these documents.

We must be guided in our interpretation of these documents by a fundamental principle of construction. It is well established that repeals "by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson* v. *Browne*, 205 U.S. 309, 321; see also *United States* v. *Lee Yen Tai*, 185 U.S. 213; *Whitney* v. *Robertson*, 124 U.S. 190. A joint resolution regularly adopted and approved has the force and effect of a statute.

The plaintiff relies firstly, on the "Treaty of Friendship, Commerce and Consular Rights," ratified on July 21, 1953 and concluded on November 5, 1954. This treaty makes applicable, "as a provisional measure pending the conclusion of a more comprehensive" treaty, the "Treaty of Friendship, Commerce and Consular Rights," concluded on December 8, 1923, 44 Stat. 2132.

The pertinent provision of Article I of the latter treaty reads as follows: "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." This provision cannot be construed as a repeal of the Joint Resolution. The language reads in future and is consistent with the right preserved under the Joint Resolution, to wit, the right to seize and vest property subject to seizure and vesting prior to January 1, 1947.

The plaintiff relies secondly on the "Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany," signed on October 29, 1954 and ratified on July 27, 1955. The pertinent provision of Article VI of this treaty reads as follows: "Nationals and companies of either Party shall be accorded national treatment with

respect to access to the courts of justice * * * within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights." This provision, like the provision contained in the earlier treaty, cannot be construed as a repeal of the Joint Resolution. The language, as in the earlier treaty, reads in futuro and is consistent with the right preserved under the Joint Resolution.

The plaintiff relies finally on the "Bonn Occupation Agreements" of May 26, 1952 as amended by the "Paris Protocol" of October 23, 1954. There is nothing in these agreements which may be construed as a repeal of the Joint Resolution. It is to be noted that Article 3, paragraph 1, of the "Convention on the Settlement of Matters Arising out of the War and the Occupation" impliedly, if not expressly, recognizes the right reserved under the said Resolution. The pertinent language reads as follows: "The Federal Republic (of Germany) shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of a state of war, * * *."

It does not follow, however, that the defendant is entitled to prevail on the present motion. A judgment under either Rule 12(c) or Rule 56(b) is essentially a judgment on the merits and may be entered only upon a conclusive determination of the issues of law. The only relief to which the defendant is entitled at this time is a dismissal of the action without prejudice; if and when the disqualification incident to the enemy status of the plaintiff is lifted, either by treaty or otherwise, the plaintiff may have a right to maintain its action in a court of competent jurisdiction.

The motion for judgment will be denied. The present action, however, will be dismissed, without prejudice to the right of the plaintiff to institute and maintain a new action when the disqualification is lifted.

Order

This matter having come before the Court on the application of defendant for an order pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of the defendant; and, the Court having considered the record herein and the arguments of counsel and having filed its opinion with the Office of the Clerk on the 5th day of February, 1957:

It Is Ordered, on this 4th day of March, 1957, that the motion for judgment be, and it hereby is, denied but that the present action shall be, and it hereby is, dismissed without prejudice.

William F. Smith
U.S.D.J.